BARBARA REUKEMA*

No New Deal on Liability Limits For International Flights

On April 17, 1984, the United States Supreme Court ruled in *Franklin Mint Corporation v. Trans World Airlines, Inc.*[1] that the Warsaw Convention's[2] limitations on air carriers' liability are enforceable in United States courts, and in so ruling put an end to the speculation which had abounded since the concept of the free market price of gold had evolved sixteen years earlier.[3]

I. Background

On March 23, 1979, the Franklin Mint Corporation delivered four packages of numismatic materials weighing 714 pounds in total, to Trans World Airlines (TWA) for carriage by air (as cargo) from the United States to England's Heathrow Airport. Thus, there was no dispute that the Warsaw Convention applied to the transportation,[4] and because the articles were

*B.A., Essex; M.Sc., Warwick; LL.B., LL.M., D.C.L., McGill; Author of *Discriminatory Refusal of Carriage in North America* (Kluwer, 1982); Adjunct Professor, Southwestern University School of Law.

1. 104 S. Ct. 1776 (1984)

2. The Convention's official title is the "Convention for the Unification of Certain Rules Relating to International Transportation by Air" [hereinafter cited as the "Warsaw Convention"]. It was opened for signature on October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. On June 15, 1934, the Warsaw Convention received the required "Advice and Consent" from the Senate by a voice vote. 78 Cong. Rec. 11,582 (1934). The adherence of the United States was proclaimed on October 29, 1934.

3. *See* Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COMM. 645 (1974); Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. INT'L L. & ECON. 323; Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. MAR. L. & COMM. 73 (1974); Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. WORLD TRADE L. 126 (1973); Martin, *The Price of Gold and the Warsaw Convention*, 4 AIR L. 70 (1979).

4. *See*, Warsaw Convention, Article 1. *See also*, Grein v. Imperial Airways, Limited, [1937] 1 K.B. 50 (C.A. 1936) and Grey v. American Airlines, Inc. 95 F. Supp. 756 (S.D.N.Y. 1950) *aff'd.* 227 F.2d 282 (2d Cir. 1955) *cert. denied* 350 U.S. 989 (1956).

either lost or destroyed while they were TWA's responsibility,[5] the parties stipulated that TWA was liable for the loss.[6] The dispute concerned the extent to which TWA was liable.[7] Franklin Mint brought suit in the United States District Court to recover about $250,000, but the district court[8] held that under the Convention, TWA's liability was limited to $6,475.98—a figure derived from the weight of the packages, the liability limit set out in Article 22 of the Convention (250 poincaré francs per kilogram)[9] and the last official price of gold ($42.22 per troy ounce) in the United States. The dissatisfied plaintiffs appealed, considering, no doubt, that the district court's decision ignored developments in the international monetary system with respect to gold. Those developments are summarized below.

In 1945, the United States joined the International Monetary Fund (IMF) and undertook to maintain a "par value" for the dollar and to buy and sell gold at the official price in exchange for balances of U.S. dollars officially held by other IMF nations.[10] However, starting in 1955, the U.S. incurred persistent balance of payments deficits, and between 1955 and 1968, the United States gold reserves plummeted from around $24 billion to approximately $10 billion.[11] This depletion of the U.S. gold reserves led the IMF countries to agree to stop buying and selling gold on the free market at the official rate of $35 an ounce, and a so-called "two-tier" system of gold pricing developed—one utilizing the $35 official price and the other using a price set by the forces of supply and demand which was considerably in excess of the $35 figure.[12] In August 1971, the United States suspended its commitment to convert dollars into gold.[13] The U.S. dollar was subse-

5. Warsaw Convention, Article 18.

6. 52 U.S.L.W. at 4445.

7. Although the Convention allows for a special declaration of value to be made at the time of delivery to the carrier (Article 18) if the consignor does not wish to be retricted to the liability limitations laid down in the Convention (Article 22), Franklin Mint made no such declaration.

8. 525 F. Supp. 1288 (S.D.N.Y. 1981) (Knapp J. presiding).

9. The Poincaré franc is a unit of account consisting of 65½ milligrams of gold at a standard fineness of 900 thousandths. Warsaw Convention *supra* note 2, art. 22(4). The dollar value of the cargo liability limitation is calculated by converting the gold value of the Poincaré franc into U.S. dollars, i.e., the limit per kilogram is 250 × the dollar of 65½ milligrams of gold.

10. In 1929, an ounce of gold was worth $20.67 per troy ounce. United States Gold Standard Act of 1900, ch. 41, s. 1, 31 Stat. 45 (1900). When the U.S. devalued the dollar in 1934, it established an official gold price of $35.00 per ounce. Gold Reserve Act of 1934, ch. 6, s. 2, 48 Stat. 337 (1934); Presidential Proclamation No. 2072, 48 Stat. 1730 (1934). The domestic enabling legislation was the Bretton Woods Agreements Act, ch. 339, s.2, Pub. L. No. 79–171, 59 Stat. 512 (1945) (Codified at 22 U.S.C. 286 (1976).) See Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 2 U.N.T.S. 39, T.I.A.S. No. 1501 (1945).

11. P. SAMUELSON ECONOMICS (8th ed.), McGraw Hill, 691 (1970).

12. Asser, cited *supra* footnote 3, at 651. Heller, *The Value of the Gold Franc*, cited *supra* footnote 3, at 82. Heller, *The Warsaw Convention*, cited *supra* footnote 3, at 128–9.

13. *See* S. Rep. No. 678, 92d Cong., 2d Sess. 4, reprinted in [1972] U.S. Code Cong. & Ad. News 2212.

quently devalued by raising the official price of gold to $38.00 per ounce in May 1972[14] and to $42.22 per ounce in October 1973.[15]

The problems with the dollar led the IMF to draw up a plan to abolish the official price of gold, to delete references to gold in its Articles of Agreement, and to substitute the Special Drawing Right (SDR)[16] as the unit of account. The plan was proposed in the 1976 Jamaica Accords and became effective on April 1, 1978. During this period, the United States had passed implementing legislation that repealed the Par Modification Act of 1973 and abolished the official price of gold.[17] The abolition of the thirty-three year link between the U.S. dollar and gold became effective on April 1, 1978, the date upon which the Jamaica Accords came into effect; with the role of gold as a currency base having been abandoned, and its official price having been repealed, gold became a commodity, and its price fluctuated daily on the commodity exchanges.[18] In addition, even before the Jamaica Accords plan was presented to the IMF members, the parties to the Warsaw Convention met in Montreal in 1975, and drafted four Protocols[19] which substituted SDR's as the Convention's unit of conversion. The United States, however, has not ratified any of these Protocols.[20]

14. The U.S. agreed to the devaluation in December 1971, and passed implementing legislation in 1972. Par Value Modification Act of 1972, Pub. L. No. 92-268 s. 2, 86 Stat. 116 (1972) (Formerly codified at 31 U.S.C. 449 (1972).)

15. Par Value Modification Act of 1973, Pub. L. No. 93-110 s.1, 87 Stat. 352 (1973) (Formerly codified at 31 U.S.C. 449 (1976).)

16. When the SDR was created by the International Monetary Fund in 1969, it was valued at one thirty-fifth of an ounce of gold. See First Amendment of the Articles of Agreement of the I.M.F., July 28, 1969, (1969) 20 U.S.T. 2775, T.I.A.S. No. 6748. With the coming into effect of the Jamaica Accords, the value of a SDR was calculated with reference to a "basket" of sixteen national currencies. In January 1981, the basket was reduced to five currencies, namely, the U.S. dollar, the British pound sterling, the French franc, the West German deutschemark and the Japanese yen.

17. Act of October 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976). See S. Rep. No. 1148, 94th Cong. 2d Sess. 10–15, reprinted in [1976] U.S. Code Cong. & Ad. News 5944–49.

18. For example, in the first four months of 1980, the free market price of gold ranged from a high of $850 to a low of $490 per ounce. 84 Daily Journal D.A.R. 1487, 1489.

19. Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal, on 25 September 1975; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Montreal, on 25 September 1975; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, signed at Montreal, on 25 September 1975; Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Montreal, 25 September 1975. Adoption of Additional Protocol No. 2 involves adherence to The Hague Protocol of 1955, and adoption of Additional Protocol No. 3 involves adherence to both The Hague Protocol of 1955 and the Guatemala City Protocol of 1971.

20. On November 17, 1981, the Senate Committee on Foreign Relations reported in favor of

On appeal, the court of appeals for the Second Circuit took those developments into account, but in a manner that satisfied neither Franklin Mint nor TWA. The court unanimously affirmed the district court's judgment,[21] but it also ruled that sixty days from the issuance of the mandate, the Convention's liability limit would be unenforceable in the United States. The court reached that result in the following manner. Because the liability limitations found in Article 22 of the Convention are based on the "value" of gold, the court was presented with four alternatives as the correct unit of conversion: the last official price of gold in the United States;[22] the free market price of gold;[23] SDR's;[24] and, the exchange value of the current French franc.[25] The court rejected the free market price of gold as simply the highly volatile, daily fluctuating price of a commodity which is related to its supply and non-monetary uses which affect its demand. In a similar vein, the court decided that the endorsement of the current French franc would amount to a deliberate departure from the expressed

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ratifying Additional Protocol No. 3 (which deals with passengers and baggage) and Protocol No. 4 (which deals with cargo). On March 8, 1983, the Senate voted 50 to 42 in favor of ratification; the measure, therefore, failed to achieve the two-thirds majority required for consent. See S. Exec. Rep. No. 97-45 (1981); 129 Cong. Rec. S2770 (daily ed. Mar. 8, 1983), S. Exec. Rep. No. 98-1 (1983).

21. 690 F. 2d 303 (2d Cir. 1983) (Oakes, Cardmore and Winter C JJ.).

22. The last official price of gold was used as the conversion factor in the following cases: Costell v. Iberia, Lineas Aereas de Espana, S.A., No. 255 (Court of Appeal of Valencia, Spain, Oct. 16, 1981); Deere & Company v. Deutsche Lufthansa Aktiengesellschaft 17 Avi. 17,178 (N.D. Ill. 1982); In Re *Air Crash at Warsaw, Poland on March 14*, 1980 535 F. Supp. 833 (S.D.N.Y. 1982); Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc. 562 F. Supp. 232 (N.D. Ill. 1983).

23. The free market price of gold was used as the conversion factor in the following cases: Boeringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc. 531 F. Supp. 344 (S.D. Tex. 1981); Kuwait Airways Corp. v. Sanghi, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978); Zakoapolos v. Olympic Airways Corp., No. 256 of 1974 Ct. of App.; 3d Dep't, Athens, Greece (Feb. 15, 1974).

24. SDR's were used as the unit of conversion in the folowing cases: Kislinger v. Austrian Airtransport, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria, June 21, 1983); Linee Aeree Italiane v. Ricciole (Rome Civil Court Judgment 609/1979, Nov. 14, 1978); Rendezvous-Boutique-Parfumerie Friedrich und Albine Breitinger GmbH v. Austrian Airlines, No. 14 R 11/1983, Court of Appeals of Linz, Austria, June 17, 1983). Legislation has been passed in the following countries adopting the SDR as the basis for converting the Convention's limits into national currency: Canada, (Currency and Exchange Act: Carriage by Air Act Gold Franc Conversion Regulations, Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983)); Great Britain, (Carriage by Air Act (Sterling Equivalents) Order of 1980, Statutory Instrument 1980, No. 281, effective Mar. 21, 1980)); Italy, (Law No. 84 of Mar. 26, 1983, 90 Gazetta Ufficiale della Republica Italiana (Apr. 1, 1983)); Republic of South Africa, (Carriage by Air Act, No. 17 of 1946, as amended by No. 5 of 1964 and No. 81 of 1979, Stat. Rep. S. Afr. (Issue No. 13) 15, implemented by Dep't of Transport Notice R 2031 (Sept. 14, 1979)); Sweden, (Carriage by Air Act (1957:297) amendment to ch. 9, s. 22, effective Apr. 27, 1978.

25. The exchange value of the current French franc was used as the conversion factor in the following cases: Association Aeronautique v. Thierache (1973) R.F.D.A. 212 (T.G.I. Paris 10.2.73); Chamie v. Egyptair (Cours d'appel Paris, Jan. 31, 1980); Pakistan Int'l Airlines v. Compagnie Air Inter. S.A., (Cours d'appel Aix-en-Provence, Oct. 31, 1983).

wishes of the framers of the Convention to avoid the use of a single national currency, the price of which was subject to unilateral action.[26] The adoption of SDR's did not find favor with the court because SDR's are a creature of the IMF that have been modified at will by that body[27] and which have no basis in the Convention. As for the last official price of gold in the United States, this was dismissed as a possible conversion unit on the grounds that the repeal of the Par Modification Act in 1978[28] was a legislative declaration that the price of $42.22 per troy ounce of gold was no longer recognized in the United States and that to continue to use the now-repealed price of gold thus finds "no support in law or logic."[29] The Court concluded that in repealing the Par Modification Act, Congress had abandoned the unit of conversion specified by the Convention and had not substituted a new one. Since neither international nor domestic sources of law had specified a new unit of account for conversion—and enforcement of the limits requires such a unit for conversion into the national currency—the liability limitations were unenforceable in U.S. courts. The Second Circuit however, affirmed the district court's decision to use the last official price of gold in the case at hand, because the court considered that substantial injustice and hardship would result if carriers were not allowed time (sixty days) to reformulate their tariffs. In deciding to reject all of the suggested units of conversion, the Second Circuit considered, but decided not to be influenced by (as Judge Knapp had been in the district court),[30] the fact that the Civil Aeronautics Board (CAB)[31] had espoused the last official price of gold as the conversion factor and, consequently, all U.S. carriers had utilized it in calculating the dollar value of the Article 22 limitations printed in their tariffs.[32]

26. Article 22 of The Hague Protocol of 1955, underscores this argument since it has deleted reference to the Poincaré franc in its liability limitations, and defines, instead, the specified sums with reference to "a *currency* unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." The United States, however, has never ratified The Hague Protocol, so the former language governs United States courts. The change was merely one of form because the elimination of any reference to the French franc merely clarified the desire of the framers of the Convention to use gold as the currency unit.

27. *See supra* footnote 16.

28. Cited *supra* footnote 15.

29. 690 F.2d 303, 309.

30. 525 F. Supp. at 1289.

31. The CAB had been delegated for many years, including the period at issue in the case, the authority to convert the Convention's liability limitations into the national currency. Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq*. Currently, the Department of Transportation (in consultation with the Department of State) exercises the powers formerly given to the Board. 49 U.S.C. 1551 (Supp. V 1981).

32. International air carriers are required to file their tariffs with the CAB specifying their liability limitations in U.S. dollars. 49 U.S.C. 1373(a); c.f. 14 C.F.R. s.221.38(a)(2), 221.38(j)(1983). Thus, when the official price of gold was increased in 1972 to $38.00 per ounce and again in 1973 to $42.22 per ounce, the CAB directed carriers to increase the dollar-based liability limits in their tariffs. CAB Order 72-6-7, Dkt. 24521, adopted June 2, 1972, 37 F.R. 11384 (1973) and CAB Order 74-1-16, Dkt. 26274, adopted Jan. 3, 1974, 39 F.R. 1526 (1974).

In a petition for certiorari to the Supreme Court, TWA challenged the court of appeals' declaration that the Convention's liability limit was prospectively unenforceable.[33] In a cross-petition Franklin Mint contended that the court's holding regarding the unenforceability of the liability limits should have been retroactive as well as prospective.[34] Both petitions were granted.[35]

II. The Supreme Court Judgment

In an eight-to-one decision, the United States Supreme Court affirmed the judgment of the Second Circuit as far as using the last official price of gold as the unit of conversion was concerned, but rejected the declaration that the liability limits were prospectively unenforceable.[36] Justice O'Connor, writing for the majority, concluded that neither the legislative history nor the repeal of the Par Modification Act in 1978[37] make any reference to the Warsaw Convention. Rather, the repeal was intended to give formal effect to a new international monetary system, and was unrelated to the conversion requirements of the Convention. The Court concluded that legislative silence is not sufficient to abrogate a treaty, and noted that not only have Congress and the Executive Branch not given the notice required to the other parties if the United States planned to abrogate the Convention,[38] but the Executive Branch regards the Convention's standards as still being enforceable in the United States. The Court further held that, because the parties to the treaty continue to assert its vitality, a private person (such as the plaintiff, Franklin Mint) may not invoke the doctrine of *rebus sic stantibus* to assert that the treaty has ceased to be binding owing to a substantial change in conditions having occurred since its promulgation. The Court further found that a $9.07 per pound cargo liability limit (based on the last official price of gold in the United States) was not inconsistent with domestic law or with the Convention itself. Congress had never suggested when it repealed the Par Value Modification Act that the CAB should use a conversion factor other than the last official price of gold. In

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Although the market price of gold diverged significantly from the last official price, the CAB continued to use $42.22 per ounce as the conversion factor. Between March 1980 and May 1981, three internal CAB memoranda addressed the argument that the free market gold price might be a more appropriate conversion factor. 84 Daily Journal D.A.R. 1487, 1488 note 20. The net result of this correspondence was that the CAB continued to engage in the legal fiction that an official gold price of $42.22 per ounce exists in order to fulfill the CAB obligations under the Convention. J. Golden, Director, Bureau of Compliance and Consumer Protection, CAB, Memorandum of May 20, 1981 at 6.

33. *Cert. granted* 77 L. Ed. 2d 1347 (1983) (No. 82-1186, Jan. 15, 1983).
34. *Cert. granted* 77 L. Ed. 2d 1347 (1983) (No. 82-1465, Mar. 1, 1983).
35. The U.S. Supreme Court heard oral arguments in the case on Nov. 30, 1983.
36. 84 Daily Journal D.A.R. 1487, 52 U.S.L.W. 4445, 18 Avi. 17,118 (1984).
37. Cited *supra* footnote 15.
38. Warsaw Convention, Article 39.

addition, given that the purpose of the Convention was to set a limit on a carrier's liability that would be stable and, therefore, predictable and uniform, to tie the Convention's limits to the free market commodity price of gold would not only fail to effect any purpose of the framers of the Convention, but would also be inconsistent with well-established international practice.[39]

Both the majority and the dissenting opinion filed by Justice Stevens were in agreement that the "value" of gold should be used as the conversion unit, but the majority approved utilization of the last official price whereas the dissent favored the free market price. The whole Court also appeared to agree that a liability limit of $9.07 per pound does not represent today the same value as it did in 1934 when the United States adhered to the Convention.[40]

III. Implications of the Decision

A. No Judicial Reform to Protect Plaintiffs This Time

The *Franklin Mint* case presents yet another example of one or other of the U.S. courts expressing their dissatisfaction with the liability limitations in the Warsaw Convention, and endeavoring to attenuate the Convention's authority.[41] Drafted in 1929, the Convention was designed, first, to protect the fledgling aviation industry from ruinous damage suits (or the alternative of exorbitant insurance premiums) and, second, to insure a certain degree of uniformity of legal obligation, given the expected international character of the industry.[42] The latter goal was achieved by creating a cause of action[43] and a uniform body of liability rules to govern international aviation which would supersede the scores of differing domestic laws.[44] The former goal was accomplished by placing monetary limitations on a carrier's liability for personal injury[45] and damage to baggage[46] and cargo.[47] The

39. In view of the number of countries which have utilized alternative conversion factors (see *supra* footnotes 22, 23 and 24) international practice may not be well established.

40. For a forty-four pound suitcase, the liability limit was $330 in 1934, $359 in 1972 and $400 in 1974. In terms of purchasing power, $330 in 1934 was equivalent to $1,031 in 1972 and $1,215 in 1974. 84 Daily Journal D.A.R. at 1489 note 34.

41. For a recent, comprehensive, but somewhat pessimistic, view of judicial encroachment onto the Convention's territory, see DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell*? 49 J. of Air L. & Comm. 71 (1983).

42. II Conference International de Droit Privé Aerien, 4–12 October 1929, cited in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 at 498–501.

43. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978) *cert. denied*, 439 U.S. 1114 (1979).

44. *See, for example*, Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977) *cert. denied*, 434 U.S. 922 (1977). Currently, there are approximately one hundred and twenty countries which adhere to the Convention making it the most widely adopted treaty concerning private international law.

45. Warsaw Convention, Article 22(1).

46. *Id.*, at article 22(2) for checked baggage and Article 22(3) for unchecked baggage.

quid pro quo for the limited liability was the establishment of a presumption of liability on the part of the carrier.[48] The liability limitations were expressed in terms of the French Poincaré franc[49] and, thus, when the United States adhered to the Convention,[50] the limit of 125,000 francs per passenger for personal injuries converted to approximately $8,300.[51] Likewise, the limits of 250 francs per kilogram for checked baggage or cargo, and, 5,000 francs per passenger for unchecked baggage, translated into $16.60 per kilogram and $330 per passenger, respectively.

The United States' dissatisfaction with the low personal injury liability limitations led, in the mid-1950s and the mid-1960s, to proposals for revision of the Convention. At a conference in The Hague in 1955,[52] the conferees[53] could only agree on a doubling of the limit for personal injuries.[54] The United States unenthusiastically signed the Protocol a year later but did not present it to the Senate until July 1959. The Senate, however, never ratified The Hague Protocol, insisting that the limitation was still too low. Ultimately, the Kennedy/Johnson Administration threatened that the United States would denounce the Convention, the threatened denunciation coming in the wake of Congress' failure to enact a legislative package approving The Hague Protocol while compelling the purchase by all U.S. carriers engaged in international transportation of $50,000 in insurance for each passenger. In order to avoid a denunciation by the United States, a conference was convened in Montreal, in the spring of 1966, which resulted in the Montreal Agreement[55] which provided for an increase in the limit of liability per passenger for personal injuries to $75,000[56] on all flights into or out of

47. *Id.*, at Article 22(2) for cargo.

48. *Id.*, at Article 17 for personal injury and Article 18 for damage to baggage and cargo.

49. *Id.*, at Article 22(4). The Poincaré franc has been used in gold clause limitations of liability in all multilateral transportation conventions since 1924. See Asser, cited *supra* footnote 3, at 645–6. For the composition of the Poincaré franc, *see supra* footnote 9.

50. *See supra* footnote 2.

51. The precise amount was $8,291.87. See, for example, Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967) *cert. denied*, 392 U.S. 905 (1968).

52. The conference produced the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929. The Hague Protocol was opened for signature on 28 September 1955.

53. The United States' delegation had been merely observers at the conferences which led up to the drawing up of the Convention. Lowenfeld and Mendelsohn, cited *supra* footnote 42, at 502.

54. The Hague Protocol, Article XI(2). The limit, therefore, was 250,000 Poincaré francs per passenger or approximately $16,600.

55. The Civil Aeronautics Board approved the Agreement on May 13, 1966. See 31 F.R. 7302 (1966), C.A.B. Order E-23680, Dkt. 17325. The Montreal Agreement, Article 1(1) reads: "The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US$58,000 exclusive of legal fees and costs."

56. The Montreal Agreement is a special contract envisioned by Article 22(1) of the Convention, whereby the carrier and the passenger may agree to a higher limit of liability. It is

the United States.[57] Somewhat appeased, the United States agreed to continue as a party to the Convention (although the United States persevered in pressing for further increases in the personal-injury liability limit—pressure that led to the Guatemala City Protocol of 1971).[58]

The Montreal Agreement of 1966 included a requirement that the notice to international passengers (warning them that their journey may be subject to the Convention and, if so, that the Convention's liability limitations would apply) must be in type at least as large as 10 point modern type;[59] this provision is a prime example of the pressure exerted by judicial reforming zeal being brought to bear on the Convention. Unhappy with the personal injury limitation of $8,300, U.S. courts took it upon themselves to reinterpret the stipulation that the absence, irregularity or loss of the passenger ticket (and, in consequence, the absence, irregularity or loss of the notice to passengers concerning the Convention's applicability and liability limitations, contained in the ticket[60]) does not affect the contract of carriage insofar as the application of the Convention is concerned.[61] According to

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an inter-carrier agreement as opposed to the Convention which is an inter-governmental agreement.

57. The Montreal Agreement applies to all international transportation which, according to the contract of carriage, includes a point in the United States of America as a point or origin, point of destination, or agreed stopping place. Montreal Agreement, Article 1. In addition, the Convention had contained a presumption of liability "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Warsaw Convention, Article 17. Similarly, Article 18 creates a presumption of liability for damage to baggage and goods occurring during the period of transportation by air. The presumption was rebuttable if the carrier could show that all necessary measures to avoid the damage had been taken or it was impossible to take such measures. Warsaw Convention, Article 20(1). The Montreal Agreement substituted strict liability for the rebuttable presumption by not allowing the carriers to avail themselves of the "all necessary measures" defence. Montreal Agreement, Article 1(2).

58. On March 8, 1971, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Air Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28, September 1955, was opened for signature at Guatemala City. Under the Guatemala City Protocol, the personal injury limits were raised to 1,5000,000 francs, or $100,000 at the then current official price of gold of $35.00 per ounce. Guatemala City Protocol, Article VIII 1(a). The United States, however, has not ratified this Protocol, and the Guatemala City Protocol *de facto* cannot enter into force until the United States plus twenty-nine other countries have ratified it. See Guatemala City Protocol, Article XX(2). The remaining instrument of the Warsaw system, the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other Than the Contracting Carrier, signed at Guadalajara on 18 September 1961, is currently in force. However, the Guadalajara Convention clarifies the position of successive carriers and does not affect or modify the carriers' liability limitations.

59. The ink in which the notice is printed must contrast with the paper, and the printed notice must appear either on the ticket, or on a piece of paper which is either placed in the ticket envelope or which is attached to the ticket, or the notice shall be printed on the ticket envelope. See Montreal Agreement, Article 2.

60. Warsaw Convention, Article 3(1)(e).

61. *Id.*, at article 3(2).

the Convention, it is only the failure to deliver any type or form of ticket at all which affects the application of the treaty,[62] and in those circumstances, the carrier cannot avail himself of the provisions which limit[63] or exclude[64] his liability. In order to rid itself of the encumbrance of the liability limitation for personal injury, the Second Circuit revised the need for physical delivery of the ticket and substituted the requirement that the ticket must be delivered in such circumstances as to afford passengers a reasonable opportunity to take measures to protect themselves against the liability limitations established in the Convention.[65] Following in the footsteps of the Second Circuit, the District Court for the Southern District of New York[66] established another route by which to circumvent the limitation on recoverable damages for personal injuries, by requiring not only timely physical delivery, but also that the notice of the ticket advising the passenger of the Convention's liability limitations be legible.[67] According to the decision in *Lisi v. Alitalia-Linee Aeree Italiane, S.P.A.*,[68] an illegible notice renders the delivery of the ticket inadequate even though there is nothing of this in the Convention itself.

Not surprisingly, perhaps, the courts and the CAB had been playing leapfrog with one another. The CAB had promulgated a regulation in 1963, specifying 10 point modern type[69] as being the smallest acceptable type for

62. *Id.*

63. Warsaw Convention, Article 20(1) and, arguably to Article 21 as well.

64. Warsaw Convention, Article 22. In the Hague Protocol of 1955, the penalty for non-delivery of the ticket is only the loss of entitlement to the provisions which limit (not exclude) the carrier's liability. The Hague Protocol, Article III(b). The fact that it is only actual non-delivery, and not some mere irregularity in the ticket, which invokes the twin sanctions of non-entitlement to the provisions which limit or exclude liability under the unamended Convention, is underscored by the fact that the Convention in Article 4(4) (with reference to the baggage check) and in Article 9 (with reference to the air waybill) expressly requires the sanction of non-entitlement to the provisions which exclude or limit the carriers liability if a baggage check or an air waybill is delivered which does not contain a notice of the applicability of the Convention and its exculpatory provisions. *See* Grey v. American Airlines, Inc. 95 F. Supp. 756 (S.D.N.Y. 1950) *aff'd*, 227 F. 2d 282 (2d Cir. 1955) *cert. denied*, 350 U.S. 989 (1956) and Preston v. Hunting Air Transport [1956] 1 All E.R. 443 (Q.B.D.).

65. Mertens v. The Flying Tiger Line, Inc., 341 F. 2d 851 (2d Cir. 1965) *cert. den'd* 382 U.S. 816 (1965) *reh'g denied*, 382 U.S. 933 (1965) and Warren v. The Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965).

66. Lisi v. Alitalia-Linee Aeree Italiane, S.P.A. 253 F. Supp. 237 (S.D.N.Y. 1966). MacMahon J. presiding.

67. MacMahon J. considered that the provisions concerning liability were ". . . camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . . ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed." 253 F. Supp. 237, 243. The notice had been printed in 4½ point type.

68. Cited *supra* footnote 66.

69. The notice was commonly printed in 4½ point type as it had been in the *Lisi* case. *See also* Egan v. Kollsman Instrument Corporation, 21 N.Y.2d 160 (N.Y.C.A. 1967) *cert. denied*, 390 U.S. 1039 (1968).

the notice of the liability provisions.[70] The regulation apparently only came to light in 1966, when the Montreal Agreement came into being.[71] The district court's decision in *Lisi* was reported on April 1, 1966; the Montreal Agreement was approved by the CAB on May 13, 1966;[72] the Second Circuit affirmed the *Lisi* decision on December 16, 1966.[73] That interaction effectively resulted in a significant increase in the personal injury liability limitation for U.S. travellers. In its judgment in the *Franklin Mint* case, however, the Supreme Court resisted the temptation to put a similar cycle into motion for the liability limitation on the shipment of cargo. The loss of cargo is a less emotional subject than the loss of life, and so it would appear that the U.S. Supreme Court finds it easier to tolerate a limit on liability for cargo that has not kept pace with the domestic rate of inflation.

In his dissent, Justice Stevens accused the majority of basing its decision on notions of policy rather than on what the law commands, and cautioned that the Court has no authority to revise an international treaty.[74] This echoes the dissent of Moore, C.J., in the *Lisi* case, who accused the majority of judicial treaty-making.[75] In both cases, the majority stands accused of bending the rules of interpretation to warp the Convention's application; in *Lisi*, to the benefit of the plaintiff to do away with the limitation on personal injury, in *Franklin Mint*, to the detriment of the plaintiff to hold fast on the limitation for lost cargo. As far as judicial reform to protect plaintiffs is concerned, the courts are damned if they do, and damned if they don't.

B. The Extinction of the "Offspring" of Franklin Mint

The usual target of the judiciary's ire, as is noted above, has been the personal-injury liability limit, and both the language of the Second Circuit and, in rebuttal, the language of the Supreme Court, are sufficiently broad to encompass all of the liability limitations in the Convention, and the *ratio* of the case should not be restricted to cases involving cargo. At least one decision has extended the court of appeals' ruling in *Franklin Mint* to the unenforceability of the liability limits in a case involving personal injuries.[76]

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70. *See* DeVivo, cited *supra* footnote 41 at 87–91. The regulation was proposed on April 1, 1963, 28 F.R. 3281 (1963) and was adopted as 28 F.R. 11,777 (1963) and codified as 14 C.F.R. 221.175 (1963).

71. No judicial notice would appear to have been taken of the regulation which could explain why it did not come to light until three years later.

72. CAB Order E-23680, Dkt. 17325.

73. 370 F.2d 508 (2d Cir. 1966) *aff'd*, by an equally divided court without opinion, 390 U.S. 455 (1968) *reh'g denied*, 391 U.S. 929 (1968).

74. 84 Daily Journal D.A.R. 1487, 1492.

75. 370 F.2d 508, 515.

76. In re Aircrash at Kimpo International Airport, Korea, on November 18, 1983, 558 F. Supp. 72 (C.D. Ca. 1983). The defendant in the case, Korean Air Lines, is a signatory to the Montreal Agreement of 1966 and the limit in this agreement is stated in U.S. dollars rather than

However, the reasoning of the Supreme Court would appear to have eliminated the chances of this and any other similar decision being maintained in the future,[77]

There is one aspect of the *Franklin Mint* decision which can be confined to cargo cases, viz., the judicial notice which was taken[78] of the fact that the plaintiffs were experienced in sending merchandise by international air freight, and would have known that they could have declared the total value of their cargo, paid an additional fee, and recovered the declared value in full:[79] the Supreme Court was unwilling to let the Franklin Mint take advantage of what is arguably its own negligence. Similar constructive knowledge of either the implications of the Convention's liability limitations or of the provisions for making a special contract with the carrier to avoid the liability limit probably would not be imputed to an air traveller, and airplane passengers have not been held to be contributorily negligent if they do not purchase flight insurance.[80]

C. Sanctioning the Continued Existence of the Warsaw Convention

If the Supreme Court had supported the Second Circuit's declaration that the Convention's liability limitations were unenforceable in U.S. courts, the judgment would have been tantamount to the rescission of the agreement by the United States. The provisions which limit liability go to the heart of the Convention, for its primary goal was to afford some measure of protection for the carriers against disastrous damage suits. If the liability limitations were rendered ineffective, then the quid pro quo (the presumed liability of the carrier for both personal injury[81] and damage to baggage and cargo[82]) would surely also become inoperative, and plaintiffs would be responsible—absent a successful plea of res ipsa loquitur—for discovering what malfunctioned, and would have to demonstrate the concomitant who, why, when, where and how of the accident. In the world of modern aviation technology,

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in gold francs. However, initially it was successfully argued that if the liability limits of the unamended Convention were unenforceable and potential recovery of damages was, therefore, unlimited, then the Montreal Agreement is invalid under Article 23 of the Warsaw Convention which nullifies any provision tending to fix a lower limit on liability than that laid down in the Convention.

77. A motion to strike the carrier's Convention limited liability defence was granted on Feb. 22, 1983 on the Court's finding that the liability provisions of the Convention were unenforceable. On June 25, 1984, however, the District Court reconsidered its verdict on the grounds of a change in the law, i.e., the Supreme Court's decision in *Franklin Mint*, and the motion to strike was denied.

78. 84 Daily Journal D.A.R. 1487, 1488.

79. Warsaw Convention, Article 22(2).

80. Warren v. The Flying Tiger Line, Inc., cited *supra* footnote 65.

81. Warsaw Convention, Article 17.

82. *Id.*, at Article 18.

assuming the burden of proof would complicate the plaintiff's already difficult task.

A number of other provisions in the Convention are also linked to the enforceability of the liability limitations. Losing the ability to avail themselves of the limitation on liability is the penalty imposed on the carriers for failure to deliver[83] a passenger ticket,[84] a baggage check[85] or an air waybill.[86] If the penalty disappears, the delivery requirements lose their meaning. Similarly, the sanction for willful misconduct[87] on the part of the carrier or his agent is the inability to invoke the defense of limited liability. Once again, the absence of the sanction would render the provision nugatory[88] since there would be no limitation on liability whether or not the carrier's conduct amounted to willful misconduct.[89]

Because the above provisions go to the pith and substance of the Convention, it is difficult to see how they could have been severed leaving behind an agreement that would have fulfilled, in a useful and unimpaired fashion, the Convention's other aim, namely, the provision of a certain degree of uniformity in international aviation law.

D. The Prospects for Ratification of Additional Protocols Nos. 3 and 4

Although the United States Senate has voted against the ratification of Montreal Additional Protocols Nos. 3 and 4[90] the matter remains on the Senate calendar.[91] Adopting these two Protocols would mean that a liability regime based on the Guatemala City Protocol of 1971[92] governs the international carriage of passengers and their baggage, and a liability regime based on The Hague Protocol of 1955[93] governs the international carriage of

83. *See* discussion *supra* at footnote 64.

84. Warsaw Convention, Article 3(2).

85. *Id.*, at Article 4(4).

86. *Id.*, at Article 9.

87. "Willful misconduct" is the translation of the French word "dol." In The Hague Protocol, "dol" has been defined as "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result." The Hague Protocol, Article XIII.

88. Because the Guatemala City Protocol contains an unbreakable limit on liability, there is no exception for willful misconduct.

89. Article 23 of the Warsaw Convention would also appear to be rendered inoperative if the limits on liability were to disappear from the Convention, since it would be difficult for a provision to fix a lower limit of liability than that stipulated if no limits are laid down in the Convention.

90. *See supra* footnote 19.

91. 129 Cong. Rec. S2270, S2279 (daily ed. Mar. 8, 1983); S. Exec. Rep. No. 98–1 (1983).

92. *See supra* text accompanying note 58. Adherence to the Guatemala City Protocol automatically involves that State's adherence to The Hague Protocol of 1955. Guatemala City Protocol, Article XXI.

93. Cited *supra* footnote 52.

cargo.[94] Together, Protocols 3 and 4 impose absolute liability[95] on the carrier with an unbreakable ceiling on recoverable damages.[96] The Guatemala City Protocol's limit of 1,500,000 francs[97] per passenger for personal injuries is currently worth approximately $120,000,[98] a considerable increase over the $10,000 current value of the limitation in the unamended Convention. In addition, the Protocol contains two provisions for increasing the limit. First, two conferences to be held at five year intervals after the Protocol has entered into force would each be allowed to raise the limit by 187,500 francs.[99] Second, the individual member states can establish supplemental compensation schemes.[100] Under this latter provision, there is a proposal in the United States which would provide an additional $200,000 per passenger for personal injuries, giving a combined limit of $320,000 for U.S. air travellers.[101] In view of the fact that the Senate Foreign Relations Committee found that eighty-five percent of the settlements in five domestic airline crashes (in which there were no limits on liability) were for less than $320,000,[102] the coverage provided by the Guatemala City Protocol, together with the proposed additions, can hardly be described as grossly inadequate.

There are other revisions found in the Guatemala City Protocol that should make it more palatable to the United States Government. For example, a change in the jurisdiction provisions adds the domicile or permanent residence of the passenger to the list of stipulated territories where suit may be brought, thus easing the way for U.S. plaintiffs to sue in U.S. courts.[103] The Protocol also contains a "settlement inducement clause" which should speed up the pace of litigation since the courts are entitled to award attorneys' fees if the carrier does not settle the claim within a stated period.[104]

Although the Protocol includes a number of beneficial provisions (as

94. Protocol No. 4 would modify The Hague Protocol in that Protocol No. 4 allows for computerized documents to serve as the air waybill. Protocol No. 4, Article III. In both Protocols Nos. 3 and 4, the liability limits are expressed in SDR's.

95. Guatemala City Protocol, Article IV and Protocol No. 4, Article IV.

96. Because the ceilings are unbreakable (Guatemala City Protocol, Article VIII) even the willful misconduct exception would disappear. This comes from reading Article X of the Guatemala City Protocol in conjunction with Article IX of Protocol No. 4.

97. 100,000 Special Drawing Rights.

98. The limit on baggage (checked or unchecked) is 1,000 SDR's or $1,200, and the limit for cargo is 17 SDR's per kilogram or approximately $20 per kilogram. See Protocol No. 3 Article II, and Protocol No. 4, Article VII.

99. $15,000. Guatemala City Protocol, Article XV.

100. *Id.*, at Article XIV.

101. For the complete text of the Senate debate, see 129 Cong. Rep. S2235–2262 (daily ed. Mar. 7, 1983) and S2270–2279 (daily ed. Mar. 8, 1983).

102. *Id.*

103. Guatemala City Protocol, Article XII, amending the Warsaw Convention, Article 28.

104. Guatemala City Protocol, Article VIII(3).

viewed from the standpoint of the passenger) such as the one designed to get the money into the hands of successful claimants far more quickly, the inclusion of the unbreakable limit on liability, albeit at a much higher level, has incurred the wrath of the trial lawyers who represent plaintiffs in aviation accident cases.[105] Operating on a contingency fee basis of between 30 to 40 percent of recovered damages, they will be obviously and detrimentally affected by the adoption of the Protocol. As for everyone else, since the Supreme Court has shown that it is not willing to tamper further with the Convention, the choice appears to be between living with the current limit in the Montreal Agreement of 1966, denunciation of the Convention, or ratifying Protocol No. 3 and, Protocol No. 4 (those two protocols being linked).

If the United States withdraws from membership of the Warsaw Convention, the rest of the Western hemisphere will soon follow suit and that will put an end to whatever uniformity, predictability and stability that the Convention afforded to international air travellers. The airlines of the less-developed nations still require some degree of economic protection, and the collapse of the Warsaw system will, in effect, put an end to that, too. If the United States should ratify Protocol No. 3, finding another twenty-nine countries[106] to do the same in order to bring the Protocol into force should not prove to be very difficult. The Guatemala City Protocol has been lying around for thirteen years—the time has come to get it off the ground.

105. *See* Romans, *The Montreal Protocols to the Warsaw Convention. Will the Plaintiffs Trial Lawyers Allow Them to Survive*? Proceedings of the Seventeenth Annual Air Law Symposium, Mar. 3–5, 1983 (S. Methodist Univ.).

106. Guatemala City Protocol, Article XX.